

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK ROBERT MULLENS,

Defendant and Appellant.

D041452

(Super. Ct. No. SCE214250)

ORDER MODIFYING OPINION
AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed here on June 17, 2004, be modified as follows:

At the end of the text on page 29, add as footnote 9 the following footnote:

⁹In a petition for rehearing, the People contend that (1) evidence of an acquittal is inadmissible hearsay, and (2) assuming for the sake of argument that a judgment of acquittal survives a hearsay challenge and is otherwise admissible, the court should retain discretion to exclude it under section 352. We reject these contentions.

The People did not object to the proffered acquittal evidence on hearsay grounds either in the trial proceedings or on appeal. The People raise the hearsay issue for the first time in the petition for rehearing. "It is well settled that arguments . . . cannot be raised for the first time in a petition for rehearing. [Citations.]" (*Gentis v. Safeguard Business Systems, Inc.* (1997) 60 Cal.App.4th 1294,

1308.) Further, the People waived any hearsay claim by making no trial objection on that specific ground. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 300.)

Were we to reach the merits of the People's hearsay argument, we would reject it. In *Griffin, supra*, 66 Cal.2d at pages 465-466, the California Supreme Court rejected a similar hearsay objection, stating: "The Attorney General contends that *evidence of acquittal of another crime should not be admissible to prove that a defendant was not guilty of that crime, on the ground that the acquittal is only the hearsay opinion of another factfinder* based on evidence presented at another time and place. The same objection could be made to the use of many other official records as admissible hearsay, and, accordingly, it would be anomalous to treat judgments differently from other properly authenticated official documents when they are offered, not as *res judicata*, but for their evidentiary value alone. [Citations.] Whatever merit there may be to denying judgments evidentiary value in other contexts, we are convinced that we should not depart from the rule that a properly authenticated acquittal is admissible to rebut prosecution evidence of guilt of another crime." (Italics added, fns. omitted; see also the discussion in *Hess, supra*, 20 P.3d at pp. 1125-1127, rejecting a challenge to acquittal evidence on hearsay grounds.) Presumably aware of the *Griffin* rule, the Legislature has not abrogated or modified it.

We also reject the People's section 352 contention. For the reasons already discussed, if the court in conducting its section 352 analysis decides that the section 1108 propensity evidence should be admitted, the court must also admit the evidence of acquittal to rebut the propensity evidence. The admission of acquittal evidence under the *Griffin* rule to rebut the propensity evidence assures fundamental fairness and protects the defendant's due process right to a fair trial and the right to present a defense.

There is no change in the judgment.

Respondent's petition for rehearing is denied.

NARES, Acting P. J.

Copies to: All parties